

revenues. Murvin Aff. at ¶ 20; Lee Aff. at ¶ 20; Hansen Aff. at ¶ 17; Williams Aff. at ¶ 21. This will incite a vicious cycle of further reductions in program quality and quantity, leading unavoidably to the demise of the network.

A fourth scenario may be that new networks, due to considerations of programming quality or quantity, may be unwilling, or contractually or competitively unable, to caption their programming. However, as recognized by the Commission, new networks that do not provide captioning will be less attractive to MVPDs, who as bearers of the legal responsibility for captioning, will have a strong incentive to carry networks with a higher percentage of captioned programming.²⁸ Murvin Aff. at ¶ 24; Lee Aff. at ¶ 23; Williams Aff. at ¶ 28. Because providers will, in fact, not be inclined to purchase programming from networks that are not as fully closed captioned, the Commission's proposed rules will work discriminatorily against those networks that are economically least able to bear the burden of captioning -- the low-penetrated, start-up networks. Moreover, MVPDs will necessarily look to new channel additions to fulfill a greater share of their captioning requirements. MVPDs have greater leverage over networks negotiating for carriage than over existing networks that have developed subscriber loyalty and are less likely to be dropped for failing to caption. Murvin Aff. at ¶ 24; Lee Aff. at ¶ 24; Hansen Aff. at ¶ 23; Williams Aff. at ¶ 29.

Finally, a new network that cannot either reduce the quantity or quality of its programming, or choose not to caption at all, may have no choice but to cut other crucial portions of its budget to pay for the captioning. Murvin Aff. at ¶ 20; Lee Aff. at ¶ 20; Hansen Aff. at ¶ 20; Williams Aff. at ¶ 24. For example, networks may be forced to reduce their

²⁸See NPRM ¶ 28 ("a provider can refuse to purchase programming that is not closed captioned.").

expenditures on marketing and promotions or personnel in order to pay for the cost of closed captioning. But this too will impair their ability to gain carriage and, ultimately, to survive.

Even though phased in, the proposed captioning requirements will impact the programming selections of MVPDs *now*. Program affiliation contracts are generally for a multi-year term, frequently for five or more years. MVPDs make programming selections now that last long into the future and seek stability in their programming line-ups.²⁹ Accordingly, they will consider whether a programmer presently offers enough captioned programming to meet its required level of captioning in the future. Thus, a new cable network will be placed at an *immediate* competitive disadvantage versus its larger, more established competitors. Murvin Aff. at ¶ 25; Hansen Aff. at ¶ 24; Lee Aff. at ¶ 24; Williams Aff. at ¶ 29.

Under any of the scenarios discussed above -- reduced program quality, reduced program quantity, non-captioning, or reduced marketing budgets -- Commenters and other start-up programmers run the risk of being displaced (or "bumped") from the MVPD systems by which they are currently carried. Murvin Aff. at ¶ 26; Hansen Aff. at ¶ 25; Lee Aff. at ¶ 25; Williams Aff. at ¶ 30. This risk is both real and substantial. As niche programmers, they lack the widespread appeal of other networks who target broader audiences. In addition, as new networks, they generally have not yet created subscriber loyalties on par with more established networks. Given this tenuous posture, even a relatively small reduction in the quality or quantity of programming, or slightly less captioning than other networks, or slightly curtailed marketing and

²⁹See Jim Cooper, *Throwing Money Around*, CABLEVISION, Jan. 27, 1997, at 17 ("You need to get the shelf space in the next two years to have a business in the next 10," says Bill Goodwyn, Senior Vice President of Affiliate Sales for Discovery Networks.").

promotion efforts, could have significant and harmful consequences for a network -- loss of existing carriage and hindered future growth.

2. Library Programming

All programmers -- not just new networks -- would be extraordinarily burdened by a requirement that the vast majority of previously published ("library") programming be closed captioned within the Commission's proposed transition period. As demonstrated by commenting parties in response to the Commission's Notice of Inquiry, the resources required to caption library programming are prohibitive for even the largest programming producers. *NOI Comments of CBS, Inc.* (March 15, 1996) at 37-38; *NOI Comments of Home Box Office ("HBO")* (March 15, 1996) at 13-14. Indeed, HBO, which has its own in-house captioning department, states that it would take that department six years to caption the programming aired on HBO and Cinemax in a single year. *NOI Reply Comments of Home Box Office* (April 1, 1996) at 11. Congress recognized the potentially insurmountable task of captioning library material when it created a more relaxed standard for this category of programming. HOUSE REPORT at 114 ("economic or logistical difficulties make it unrealistic to caption all previously produced programming"). Thus, in contrast to mandatory "full" requirements imposed on new programming, Section 713(b)(2) provides that video program providers or owners "maximize the availability of library programming." In adopting this standard, Congress acknowledged that "it is clearly more efficient and economical to caption programming at the time of production" and expressly stated that it did "not intend that the requirement for captioning should result in a previously produced program not being aired due to the costs of captions." HOUSE REPORT at 114.

Given the enormous cost of captioning library programming and the relaxed Congressional

mandate, the Commission should not impose mandatory requirements on library programming. Substantial amounts of library programming have been captioned voluntarily to date³⁰ and there is no reason to doubt that such efforts will continue at least at the same rate, if not even more aggressively, in the future. Moreover, the warning signs are clear that required captioning of library programming will not necessarily encourage more captioning of such programming, but rather may lead programmers to avoid carriage of some of the most desirable library programming, which is uncaptioned, and instead to emphasize carriage of more mundane, previously captioned material. Before imposing a regulatory requirement that is not mandated by the statute, and that practically may not benefit the hearing-impaired, prudence dictates that the Commission should allow a period of at least two years to assess whether voluntary captioning has proceeded at a rate that truly will maximize the availability of captioned library programming to the hearing-impaired.

However, if the Commission determines that it must adopt a requirement that a portion of library programming be captioned, the final percentage for the industry as a whole should be significantly less than the proffered 75 percent, the transition period should be lengthened for all programmers, and new, start-up programmers such as Commenters should be exempted from any such requirement until they attain a threshold level of 20 million subscribers. First, 75 percent is simply too high an ultimate level for required closed captioning of library programming. The Commission itself concluded that it would be "inappropriate to mandate captioning of nearly all library programming." NPRM ¶ 58. Requiring captioning of such a large percentage of programming is not only unrealistic, it would undermine the overarching goals of this proceeding

³⁰NPRM at ¶ 11; *NOI Comments of The National Cable Television Association, Inc.* at 3-5.

-- to supply diverse, quality programming to the hearing-impaired -- for it would likely lead programmers to forego previously unviewed (and uncaptioned) programming of a distinctive nature, and to instead opt for previously captioned programming that likely has been run, and re-run, countless times on television.

Second, any deadline imposed on captioning of library programming must take into account the "enormous amount" of such programming presently distributed to subscribers. NPRM ¶ 57. A vast and valuable reservoir of library programming exists, including classic movies and television series, as well as current-run, uncaptioned programming, that is of interest to all viewers. Clearly the eight to ten year transition period proposed for new, non-exempt programming would not be adequate to caption this huge supply of library programming and would again have the unintended and undesirable effect of forcing program networks to carry previously captioned programming that is already widely distributed.

Third, whatever percentage and transition period the Commission concludes are appropriate for programmers in general, clearly start-up networks, such as Commenters, with infinitely smaller viewing audiences and programming budgets than broadcast networks and established cable networks, are not capable of bearing the same burden of captioning library programming. *See infra.*; *see also NOI Comments of NAD* at 37 (recognizing differences in the "size and resources of the provider"). Given the enormous costs of producing and acquiring new and original programming, many start-up programming networks, including some of Commenters, often rely upon, and distribute to the viewing public, diverse library programming, particularly in their formative years. For example, 27 percent of the programming distributed by Golf, and over 50 percent on Outdoor Life and Speedvision, is library programming. Murvin

Aff. at ¶ 27; Williams Aff. at ¶ 31. These are not merely tired re-runs. Rather, this library material is quality programming, much of which has not been available to viewers in numerous years, and some of which has never been televised anywhere in the United States. Murvin Aff. at ¶ 27; Williams Aff. at ¶ 31; Lee Aff. at ¶ 26. This programming has been selected because it is attuned to the specialized viewing needs of subscribers to niche program networks such as Commenters. If, in addition to captioning new programming, these new networks were required to caption such library programming as well, they would have no choice but to forego much of this distinctive library material, choosing instead more widely aired (*i.e.*, commonplace) programming that already has been captioned. The consequence would be an immediate decrease in the diversity of programming choices available to all subscribers -- including the hearing disabled -- and ultimately the loss of a number of new, niche networks.³¹

C. It Is Unfair And Unwise To Impose The Same Captioning Requirements On New, Start-up Cable Networks As On The Major Broadcast And Cable Networks

The Commission's proposed rules treat all suppliers of video programming as equals, when in fact they are anything but equal. The Commission has wholly failed to consider the vast differences in size, viewership, programming budgets and other highly relevant distinguishing characteristics.

Commenters reach a mere fraction of the total number of viewers served by the major cable or broadcast networks. Commenters' programming is currently available to 1.2 to 8 million subscribers, whereas the largest cable networks reach nearly 70 million subscribers and all of the

³¹The networks would be forced to rely almost exclusively on more limited amounts of programming, which would have to be recycled throughout the program day, significantly diminishing the appeal of the networks to subscribers, advertisers and MVPDs.

major broadcast networks reach virtually all of the 97 million television households. NCTA CABLE BOOK, *supra*, at 1, 16. All low-penetrated cable networks (*i.e.*, those with fewer than 20 million subscribers), collectively have a total of 459.7 million subscribers, for an average per network of 5.5 million.³² In contrast, all other cable programming networks, *i.e.*, those having 20 million or more subscribers, collectively serve a total of 2.2 billion viewers, for an average per network of 46.2 million subscribers each.³³ Similarly, the major broadcast television networks serve an average, per network, of 96 million television households.³⁴

The proposed captioning rules fail to take account of these dramatic differences and the resulting disproportionately adverse impact that the Commission's proposed requirements will have on start-up programming networks.³⁵ Captioning costs are fixed -- they do not vary by the number of viewers or subscribers. Thus, networks that program the same amount of non-exempt new and library programming will be subject to the same captioning costs. Consequently, on a per-viewer basis, the burden of captioning costs will be substantially larger for low-penetrated, start-up networks such as Commenters.

³²In arriving at these numbers, Commenters relied upon data from BROADCASTING & CABLE 1997 Fact Book, the Commission's 1996 Annual Competition Report, CS Docket No. 96-133 (rel. Jan. 2, 1997) and an article in Cablevision magazine, Jim Cooper, *Throwing Money Around*, CABLEVISION, Jan. 27, 1997, at 17.

³³*Id.*

³⁴*Television: Numbers on Its Side*, INTERACTIVE CONTENT, Dec. 1, 1995.

³⁵It should also be noted that the broadcast networks and large, more established cable networks are generally operating profitably, and some very profitably indeed. Whereas the likely effect of captioning mandates on these entities will be a somewhat modest reduction in their level of profitability that does not threaten their survival, such is not the case for Commenters who, already operating in the red, cannot afford to incur further losses of such a magnitude.

Commenters each operate 24-hour networks and are responsible for delivering 168 hours of programming hours each week. By comparison, ABC, CBS and NBC offer on average about 91 hours of programming per week to their affiliates, or little more than half of the total programming hours distributed by Commenters. NPRM ¶ 13 (citing data provided by ABC, CBS and NBC). But the differences extend well beyond total viewership and amount of programming delivered. Commenters' programming budgets, for example, are on an entirely different scale relative to their larger, more established competitors.³⁶ Larger programming networks also have the benefit of substantially more advertising revenues than emerging networks because, as noted above, advertising revenues for networks with fewer than 10 million, or even 20 million, subscribers are limited. *See* Section III B *supra*. Finally, larger and more-established entities have many more managerial and technical personnel to manage the captioning process and, in some cases, perform captioning in-house. *See NOI Comments of Home Box Office, Inc.* at 5-6.

Captioning will impose substantial additional overhead. While this requirement will burden the video programming industry as a whole, the burdens will be substantially greater for new, low-penetrated networks, which simply cannot support the same overhead costs as their larger competitors.³⁷ The Commission did not consider this disparate impact, despite Congress'

³⁶For example, Commenters' average annual programming budget of roughly \$20 million is 20 percent of MSNBC's \$100 million annual programming budget, 14.3 percent of USA Networks' annual programming budget for original programming, and **1 percent of CBS' \$2 billion** annual programming budget. Mark Landler, *New! Improved? TV's Bell Telephone Hour*, THE NEW YORK TIMES, Mar. 19, 1995 ("CBS has an annual programming budget of more than \$2 billion"); Bill Carter, *Bitterness and Posturing As Rivalries Resurface In Fight For Cable*, THE NEW YORK TIMES, June 3, 1996 (programming budget for MSNBC is over \$100 million a year); Jim McConville, *Cutting out the kid stuff: USA, TNT have repositioned afternoons to skew older as lead-in to primetime*, BROADCASTING & CABLE, Jan. 8, 1996 (\$140 million budgeted for USA Networks' original programming schedule in 1995).

³⁷Nor can low-penetrated networks avoid such costs by attempting to caption programming in-house rather than through outside captioning houses. First, small start-up networks are rarely in a position either

expressed intent that the captioning rules "should not be economically burdensome on program . . . distributors." HOUSE REPORT at 114. Commenters do not dispute the goal of maximizing closed captioning or improving access by the hearing disabled to video programming. Indeed, closed captioning ultimately is in the interest of all networks, as persons with hearing disabilities, totalling 23 million, constitute a significant potential audience for the networks' programming and advertising. NOI ¶ 1 (citing U.S. Dep't of Commerce, Economics and Statistics Admin. Bureau of the Census, *Statistical Abstract of the United States*, 140 (114 ed. 1994)). New networks have every incentive to seek to caption as soon as possible, for start-ups, who are seeking to expand their distribution as much as possible, cannot afford to ignore an audience segment of this magnitude. This does much to explain why there has been so much voluntary captioning to date. See NPRM ¶ 11. However, this does not mean that *all* networks should be compelled to caption at the *same rate* or that some networks, *i.e.*, new networks that are low-penetrated and incurring substantial losses, should necessarily be required to close caption *at all* during their early years of operation. Imposition of a captioning requirement on such networks ignores economic reality and could in fact cause their demise. Commenters urge the Commission to give serious consideration to these conditions, and to modify its proposed captioning rules as suggested by Commenters below.

to purchase the equipment and hire the skilled personnel necessary to caption large amounts of programming. Moreover, estimates obtained by Commenters show that in-house captioning would not produce economies over outsourcing. Simply stated, close captioning is terribly expensive no matter how it is done. Murvin Aff. at ¶ 19; Hansen Aff. at ¶ 19.

V. COMMENTERS' ALTERNATIVE PROPOSAL WOULD AVOID ANY UNFAIR AND DISPROPORTIONATELY ADVERSE IMPACT ON NEW, START-UP PROGRAMMERS

Section 713(d)(1) provides that "the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming." 47 U.S.C. § 613(d)(1). The legislative history of this section clearly demonstrates that Congress intended that, in making exemption decisions, the Commission should consider: (1) the nature and cost of providing closed captions; (2) the financial resources of the programming network (*i.e.*, the individual network and not those of its corporate parent or other business units within the corporate structure); and (3) the cost of the captioning, considering the relative size of the audience served or the audience share. HOUSE REPORT at 114-115. The legislative history also makes clear that "cable networks" such as Commenters are among the entities upon which the Commission must consider the economic burden of captioning. *Id.* at 114 (explaining that the "provider" for purposes of Section 713(d) includes "the specific . . . cable network.>").

In the NPRM, the Commission stated:

[w]e seek to establish a general classification or a number of general classifications for programming for which captioning would be economically burdensome. . . . In particular we seek comment on whether a definition of economic burden should be based on factors such as relative market size, degree of distribution, audience ratings or share, relative programming budgets or revenue base, . . . or a combination of factors.

NPRM ¶ 71.

Commenters propose an exemption that will avoid any unfair and disparate harm to low-penetrated networks. This proposed exemption is within the power granted to the Commission, consistent with Congressional intent, limited in scope, consistent with the public interest, and sound as a matter of policy and economic reality.

A. Proposal: The Commission Should Classify Low-Penetrated, National, Basic Cable Programming Networks As "Exempt" Programming For Purposes Of Calculating A Video Programming Provider's Compliance With Transitional Captioning Requirements

Commenters urge the Commission to consider the factors set forth by Congress, as well as those recited by the Commission in the NPRM, and to exempt by regulation, as a class, all low-penetrated, national, basic programming networks, defined as those with fewer than 20 million paying or non-paying subscribers.³⁸

1. An Exemption For Video Programming Delivered By Low-Penetrated Programming Networks Is Consistent With Congressional Intent And Will Serve The Public Interest

In enacting Section 713, Congress repeatedly emphasized the need to balance the benefits of increased accessibility against economic realities. An exemption tied directly to the number of subscribers is certainly of a type that Congress intended when it gave the Commission this express authority. *See* HOUSE REPORT at 115 ("When considering exemptions . . . the Commission shall consider . . . the cost of captioning, considering the relative market served or

³⁸ In seeking this exemption, Commenters take no position regarding other classes as to whom exemptions may or may not be appropriate, but as to which very different economic conditions may pertain. For example, premium, pay-per-view and regional networks have very different economic bases and break-even points, as do broadcast television stations or networks. Thus, while some exemptions may be appropriate for such entities, any such exemption would likely be differently structured than that which we propose here, and the Commission's decision of whether and how to exempt low-penetrated basic cable networks need not be tied, lock-step, to what the Commission does regarding those other classes of program providers.

the audience share.") Moreover, Congress clearly indicated that the Commission must consider the substantial economic harms that will befall new programming networks if they do not receive an exemption for their programming. *Id.* ("the Commission shall consider . . . the cost of providing closed captions . . . [and] the financial resources of the programming network.").

A comparison of the collective number of viewers nationwide who receive the programming of the low-penetrated networks that would be deemed exempt under the Commission's proposal, with the collective number of viewers nationwide who receive service from all national, basic cable networks, shows that the exempt networks provide service to only 17 percent of the total of all national, basic cable subscribers.³⁹ Collectively the low-penetrated networks have a total of 459.7 million service subscribers, whereas the larger networks that would remain subject to the captioning requirement collectively serve more than 2.2 billion service subscribers, which is approximately 83 percent of all viewers nationwide who receive service from cable television networks.⁴⁰

³⁹In arriving at these numbers, Commenters relied upon data from BROADCASTING & CABLE 1997 Fact Book, the Commission's 1996 Annual Competition Report, CS Docket No. 96-133 (rel. Jan. 2, 1997) and an article in Cablevision magazine, Jim Cooper, *Throwing Money Around*, CABLEVISION, Jan. 27, 1997, at 17. Information was not available from these or other reliable sources for 19 networks, some of which are start-up networks, such as Discovery Civilization, and others of which are large, established networks, such as fX. It is unlikely that the subscriber numbers of these networks would have any significant impact on the percentages presented above.

⁴⁰In fact, the exemption would have a more limited effect than even these numbers reflect. As explained above, even exempt networks have strong economic incentives to caption voluntarily in order to reach a large segment of persons with hearing disabilities. Moreover, as exempt networks progress toward the 20 million benchmark, they will begin to caption significantly more in anticipation of loss of their exempt status.

| Network Type | Total Subscribers Served | Percent of Total |
|---|---------------------------------|-------------------------|
| All High-Penetrated National Basic Cable Networks (≥ 20 million subscribers) | 2,219,066,006 | 82.8% |
| All Low-Penetrated National Basic Cable Networks (< 20 million subscribers) | 459,657,105 | 17.2% |
| Total⁴¹ | 2,678,723,111 | 100.0% |

The logic of Commenters' proposal is further supported by the Department of Education ("DOE") guidelines for captioning grants, which to date have been a principal impetus for voluntary captioning. Under the Does guidelines, high penetration is a major factor to be considered in approving grants. *See* NPRM ¶ 10 (DOE "funding is available only for programming that reaches the largest audiences"). The DOE guidelines, like Commenters' proposal, recognize that the primary focus in the progressive development of universal captioning is on the programming providers and distributors that reach the largest audiences.

⁴¹A review of the current programming line-up of one large cable system demonstrates the limited nature and effect of the proposed exemption on the availability of captioned programming. Media General Cable is the twenty-first largest system in the United States, serving approximately 216,000 subscribers in Fairfax County, Virginia. NCTA CABLE BOOK at 15. The system currently presents 107 channels of programming. *See* Exhibit 1. Under Commenters' proposed exemption, eleven of these channels would be exempt, or a mere *ten percent* of the system total. Moreover, as there are 50 basic national cable networks on this system, an exemption for eleven of these represents only 22 percent of the system total. Persons with hearing disabilities would still receive 96 channels of programming unaffected by Commenters' proposed exemption. This figure validates Commenters' statistical analysis showing that only approximately 20 percent of all programming distributed by national basic networks would be exempt.

This proposed exemption is the only effective way for the Commission to fully avoid the disparate, adverse impact that its proposed closed caption regulations would otherwise have on start-up networks such as Commenters. On the one hand, the exemption will eliminate the possibility that low-penetration networks will be forced to reduce the quality or quantity of their programming in order to fund closed captioning. At the same time, it will eliminate the incentive of MVPDs not to carry new networks that, due to their loss operations, are not yet able to bear the costs of captioning. It will also allow new programming networks to focus their resources on creating quality programming, expanding distribution, becoming commercially viable as quickly as possible, and planning, both financially and operationally, for captioning in the future when they become economically capable of doing so.

Commenters emphasize that this is not a proposal for an indefinite exemption. Rather, it is merely a temporary reprieve from specific captioning mandates, which exemption would be applicable only while a network establishes itself financially and in the marketplace. The exemption would expire when the network achieves penetration sufficient to become commercially viable, *i.e.*, when it is carried on the basic or expanded basic tiers of MVPDs collectively have 20 million subscribers.⁴² At that point, the previously exempt program network would be exempt and fully subject to the Commission's captioning requirements, starting on the

⁴²If a network serving 20 million or more subscribers upon the effective date of the rules, or thereafter, falls below the 20 million mark, it would not automatically longer be entitled to the exemption. In that case, the network would be required to resort to the Commission's waiver procedure, under which it would be permitted to demonstrate to the Commission on a case-by-case basis its need for an undue burden exemption. *See infra* at § VI.

next transitional date on which video program provider compliance with minimum closed caption percentages are to be determined under the Commission's rules.⁴³

2. The Commission's Proposed Phase-in Approach Does Not Adequately Protect Low-Penetrated Programming Networks

This exemption for programming delivered by low-penetrated networks is also necessary because the Commission's proposed phased-in approach offers start-ups little effective relief. As described above, MVPDs in making their programming decisions now, will look to carry networks that presently can commit to meet their required captioning thresholds in the future. Thus, absent an exemption, a new network that cannot afford to caption a significant amount of programming at present will be at an immediate disadvantage in the marketplace relative to its larger, more established rivals.

Moreover, the Commission's phased-in approach, based solely on time, does not account for new programming networks that will emerge in the future (or otherwise would have emerged but for mandated captioning). Absent Commenters' proposed exemption, future new programmers will be required to incur the huge expense of captioning immediately upon commercial launch. For example, under the proposed eight-year schedule, a new cable network launching in October 2000 would be required immediately to caption *at least half* of its new non-exempt programming. Yet, this requirement would come at a time when the new network had virtually no subscribers and no revenue stream. The Commission must consider two variables--

⁴³Commenters propose that, in conjunction with this proposal, the Commission could impose legal responsibility on cable operators on a channel-by-channel basis. This could clarify the precise captioning requirements for each network, and, at the same time, ensure that start-up networks, that cannot afford the same captioning costs as large, established networks, are provided with a reprieve from the rules until they reach 20 million subscribers.

time and *penetration* -- in order to properly account for this anomaly. Commenters' proposed exemption for low-penetrated networks does just that.

In addition, new networks are seeking carriage on cable systems throughout the United States, which currently number at over 11,000. NCTA CABLE BOOK at 11. Each MVPD that carries a network will impose its own captioning mandate on the network, depending on the amount of captioning present on other programming services carried by the MVPD. Consequently, some MVPDs will require new networks to provide *more* than the average amount of captioning to be required of all MVPDs at that time, meaning that the phase in amounts provided for in the Commission's transition proposal may have little meaning, and provide little shelter, for individual programmers.

Finally, new programmers, including Commenters, are carried by DBS providers, which generally do not carry broadcast stations. Therefore, the Commission's belief that it might be possible for MVPDs to meet their initial captioning obligation with broadcast stations alone is not applicable in the context of DBS. NPRM ¶ 43. DBS providers, which will not have the "buffer" of the more heavily captioned broadcast stations, will naturally impose heavier captioning requirements on new programming networks, such as Commenters.

3. An Exemption For Low-Penetrated Networks Is Sound Policy

Commenters' proposed exemption establishes a bright-line, easy to administer rule. Subscriber penetration levels are easy to calculate and already compiled by programming networks for purposes of establishing advertising rates and soliciting new affiliates. It will be a straight-forward matter for the Commission to exempt by rule all programmers below the level of commercial viability -- 20 million subscribers. In addition, this class based exemption would

conserve Commission resources by making the otherwise inevitable case-by-case exemption determinations for individual networks unnecessary. An exemption such as this clearly is what Congress had in mind in when it gave the Commission such authority under Section 713(d)(1).⁴⁴

Moreover, while this class-based exemption is appropriate under current market conditions, the Commission can always reconsider its appropriateness if future conditions warrant. For example, if captioning technology improves to the point where it is no longer economically burdensome for low-penetrated networks to provide captioning, or if technology expands system channel capacity to the point that a network's lack of captioning did not create a disincentive for carriage by MVPDs, then removal or revision of this exemption would likely be warranted.

4. Captioning Is Likely To Increase On Low-Penetrated Networks Even If Their Programming Is Exempted

New cable networks, like all networks, have a market-based interest in attracting hearing-impaired viewers, estimated at more than 23 million. NOI ¶ 1. While an exemption will remove the legal obligation to caption, low-penetrated networks will still face competitive pressures to caption, and these will increase significantly as the established networks caption more of their programming. Also, as captioning technology improves, it will become much more affordable for new cable networks to provide this service.

Moreover, Commenters appreciate the broader market appeal of captioning beyond facilitating television viewing for the hearing-impaired. For example,

⁴⁴See Kenneth Cul Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994) at § 6.7 (listing eight different advantages of rulemaking over adjudication as a source of generally applicable rules); *SEC v. Chancery Corp.*, 332 U.S. 194, 202-03 (1947) ("The function of filling in the interstices of the Act should be performed, as much as possible, through [the] quasi-legislative promulgation of rules to be applied in the future.")

captioning has utility for all consumers interested in viewing television programming without sound (mute) while, for example, performing other tasks such as speaking on the telephone, working, or engaged [sic] in other pursuits. It also lends itself to non-residential settings such as restaurants, airports and other public places where noise makes it difficult to hear the audio portion of a television signal.

NOI Comments of Satellite Broadcasting and Communications Association (March 15, 1996) at

7. Voluntary captioning could, for example, help Golf boost its name recognition and popularity by facilitating its display with captioning in golf club houses, shops or sports bars. Similarly, America's Health may wish to be viewed with captioning in doctors' offices, hospitals, health food stores and similar locales. Outdoor Life, BET On Jazz and Speedvision will want to be viewed with captions in airports, shops or other establishments where viewers may be present but where the networks' sound may be obscured by ambient noise.

Commenters look forward in anticipation of the day when they will be financially capable of captioning significant amounts of their programming. Unfortunately, this will occur only when they reach and then exceed the minimum level of distribution for commercial viability under today's market conditions -- 20 million subscribers. Until that time, however, Commenters urge the Commission to recognize this economic reality and exempt their programming as a class.

VI. PROGRAMMING NETWORKS MUST BE ELIGIBLE FOR EXEMPTIONS BASED ON UNDUE BURDEN STANDARD ("WAIVERS")

Above, we have explained why the Commission should exempt *by regulation* those "programs, classes of programs or services" that the Commission determines would be economically burdensome to caption. Section 713(d)(1). As recognized by the Commission, it is generally preferable to promulgate clear rules, in advance, than to leave the resolution of issues

to *ad hoc* adjudication.⁴⁵ Rules provide "predictability and rationality," *id.*, and can limit the unnecessary expense of protracted case-by-case proceedings.⁴⁶ Indeed, delineating regulatory exemptions is the surest way to promote the Commission's stated goal of "quick and efficient resolution" of the exemption issue. NPRM ¶ 98. As demonstrated above, start-up, low-penetrated programming networks clearly constitute a program class entitled to such a regulatory exemption.

The Commission should, however, also develop a process for individual, case-by-case exemptions that permits consideration of the undue burden that captioning would impose on those entities that will be responsible for captioning. 47 U.S.C. § 613(d)(3). As a preliminary matter, therefore, programming networks, such as Commenters, must be permitted to file petitions for exemption under the undue burden standard.⁴⁷ Under the plan proposed by the Commission in the NPRM, programming networks will bear the actual responsibility for captioning. It would be manifestly unjust to place the actual burden of captioning on programming networks and, at the same time, preclude them from seeking an exemption. Moreover, inclusion of programming networks among those permitted to file for case-by-case exemptions is consistent with Congress' intent. Notwithstanding the Commission's narrow definition of "provider," the term, as defined by Congress in the House Report, "refers to the specific television station, cable operator, *cable*

⁴⁵*Review of Commission's Regulations Governing Television Broadcasting*, 10 FCC Rcd. 4538 (Mar. 7, 1995) at ¶ 14 (discussing adoption of duopoly rule to replace *ad hoc* adjudication).

⁴⁶*See* Davis and Pierce, ADMINISTRATIVE LAW TREATISE § 6.7 (3d ed. 1994) at 262.

⁴⁷Note that Commenters are not suggesting a waiver provision, as discussed here, in lieu of a class exemption, but rather to deal with those circumstances that do not fit within the class treatment. For example, were a network that initially was exempt but had risen to above 20 million to suddenly fall below 20 million again, it would be appropriate to treat a request for resumption of the network's exempt status under the case-by-case waiver position than under the class determination provision. *See supra*.

network or other service that provides programming to the public." HOUSE REPORT at 114 (emphasis added).

In addition, if the undue burden exemption is to be effective, it must have the same effect as a regulatory exemption. Thus, if an MVPD is legally required to caption a percentage of its new, non-exempt programming, the MVPD should not be required to consider any programming of an exempt network, including programming of a network found to be exempt under the undue burden standard, when calculating its captioning requirements. For example, if The Golf Channel were to obtain an undue burden exemption, a cable system should not be required to consider that network as part of its overall programming that is subject to closed captioning requirements.

Finally, in promulgating standards to determine whether captioning would constitute an undue burden, it is unnecessary and unwise for the Commission to be more specific than the standards set forth in the statute. The statute provides that the factors to be considered include:

- (1) the nature and cost of the closed captions for the programming;
- (2) the impact on the operation of the provider or program owners;
- (3) the financial resources of the provider or program owner; and
- (4) the type of operations of the provider or program owner.

These standards are broad enough to encompass criteria that the commenters and the Commission may deem to be important now, including but not limited to, the financial resources of the entity responsible for captioning,⁴⁸ the entity's programming budget,⁴⁹ the relative burden on that entity,

⁴⁸Commenters agree with the Commission that the ADA undue burden standard should not be adopted for closed captioning in light of the significant differences between those standards and the standards set forth by Congress in Section 713. NPRM ¶ 96 and note 186.

⁴⁹See, e.g., *NOI Comments of Stuart and Marilyn Gopen* (March 15, 1996) at 28-31.

the potential economic impact on the availability of local and niche programming,⁵⁰ and the amount of graphics or on-screen data available on the programming.⁵¹ In addition, Congress' standards are flexible enough to incorporate criteria that may emerge in the future, once the true impact of these untested captioning requirements becomes known. If the Commission were to adopt rigid criteria now, it would unnecessarily limit the scope of legitimate and relevant inquiry that may be necessary to determine whether captioning poses an undue burden to a particular entity.⁵²

VII. SECTION 713 AND THE COMMISSION'S CLOSED CAPTIONING RULES HAVE SERIOUS FIRST AMENDMENT AND EQUAL PROTECTION IMPLICATIONS

When a federal law favors certain speakers over others, it will be considered unconstitutional if the distinction is not necessary to serve a compelling governmental interest.⁵³ Section 713 runs afoul of this principle in at least two ways. First, it requires certain First Amendment speakers, video programming providers, to make their product accessible to all individuals while not imposing similar burdens on other similarly situated classes of speakers

⁵⁰NPRM ¶ 186.

⁵¹NPRM ¶ 94.

⁵²Commenters also object to the express adoption of the three additional criteria set forth in the House Report but not included in the final rule. See NPRM note 172 (referring to Congress' omission of the criteria including: the local or regional nature of programming, the non-profit status of programmer, and the availability of signing). The narrow subject areas of these additional criteria could unnecessarily limit the Commission's consideration of other relevant factors in granting undue burden exemptions in the future. Congress' decision not to include these criteria in the final language of the rule supports this conclusion.

⁵³See, e.g., *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking down editorializing restriction that does not substantially promote asserted interest); *Community Service Broadcasting v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc) (finding a violation of equal protection in FCC rules requiring only non-commercial educational broadcast stations to retain audio recordings of broadcasts).

(*e.g.*, requiring newspaper publishers to distribute Braille editions for the sight-impaired). The discriminatory imposition of this burden on one class of speaker, while sparing others without compelling justification for the distinction, violates the First Amendment and the Equal Protection Component of the Fifth Amendment's Due Process Clause. Similarly, Section 713's requirement that only certain video programming providers -- television broadcasters and MVPDs -- deliver captioned programming over their systems, while other video programming providers (*e.g.*, video cassette distributors, movie theaters, CD-ROM creators, and entities providing video programming over the Internet) have no comparable requirement imposed on them by the government, is also suspect as violating these constitutional limitations. The Commission must consider these pressing constitutional concerns in the context of the exemptions proposed here in order to minimize the potentially discriminatory impact of its proposals.

VIII. CONCLUSION

WHEREFORE, Commenters respectfully request that:

(a) the Commission adopt an exemption to its closed caption rules providing that low-penetrated national, basic cable television networks, defined as networks that are carried on the basic or expanded basic tiers of cable systems or other MVPDs, which tiers shall collectively have fewer than 20 million subscribers (paying or nonpaying), shall be deemed exempt for purposes of calculation by MVPDs of the percentage of their channels that are carrying closed captioned programming;

(b) such exemption shall expire for any low-penetrated network as soon as the MVPD systems on whose basic or expanded basic tiers the network is carried shall collectively have more than 20 million subscribers (paying or nonpaying), in which event the previously exempt

program network shall be deemed to be nonexempt starting on the next transitional date on which video program provider compliance with required minimum closed caption percentages are to be determined under the Commission's rules.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Maria Browne", written over a horizontal line.

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February 28, 1997

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Closed Captioning and Video Description
of Video Programming

Implementation of Section 305 of the
Telecommunications Act of 1996

Video Programming Accessibility

MM Docket No. 95-176

AFFIDAVIT OF ROGER WILLIAMS

1. I, Roger Williams, am Executive Vice President and Chief Operating Office, of Outdoor Life Network, L.L.C. ("Outdoor Life") and Speedvision Network, L.L.C. ("Speedvision") (collectively, "the Networks"). In this capacity, I am familiar with all aspects of the Networks' business operations.

2. The purpose of this affidavit is to provide information to the Federal Communications Commission ("Commission") in response to the Notice of Proposed Rulemaking ("NPRM") issued in the captioned matter concerning closed captioning.

3. Outdoor Life was launched on June 30, 1995, and is presently available to approximately 6 million subscribers. Speedvision was launched on January 1, 1996, and is presently available to approximately 8 million subscribers. As recently launched, start-up programming networks with relatively low subscriber penetration, Outdoor Life and Speedvision will be significantly and adversely impacted by the closed captioning regulations proposed by the

Commission.

4. In its NPRM, the Commission proposes to place legal responsibility for compliance with captioning requirements on multichannel video programming distributors ("MVPDs") and broadcasters. In reality, however, as the Commission has recognized, the brunt of the Commission's proposed captioning requirements will be borne by programming networks. And yet, start-up networks such as Outdoor Life and Speedvision, who are struggling to obtain carriage on these MVPDs, can least afford the enormous cost of the Commission's proposed captioning requirements. Unlike large, established broadcast and cable programming networks, start-up networks such as Outdoor Life and Speedvision are struggling to increase subscriber penetration to generate revenues necessary to become and remain commercially viable. Given the limited revenues available to start-up networks, any funds required to caption programming would necessarily be diverted from funds presently dedicated to the creation and acquisition of diverse, quality programming. Thus, captioning requirements would result in a reduction in the overall quality and quantity of new networks' programming, and ultimately interfere with new networks' ability to increase subscriber penetration to the levels necessary to sustain their operations. Moreover, if the Commission's proposed rules were adopted, start-up networks such as Outdoor Life and Speedvision could not simply choose to forego immediate captioning of their programming, since MVPDs, in making their channel selections, will naturally favor those programming entities that have high percentages of captioned programming.

5. Below, I will address the following points:

- a. the nature of the programming carried on Outdoor Life and Speedvision, and the decisions involved in targeting these niches;